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In the Supreme Court
OF THE
United States

OCTOBER TERM 1988

In re STACY LYNN P., a minor

DEBRA L. B., *Petitioner and Respondent*
vs.
JOHN R. P., JR., *Objector and Appellant*

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether California denied the Appellant's right to due process of law by terminating his parental rights without finding a compelling need to do so and specifically rejecting the requirement of a compelling need to terminate the fundamental right of parenting.

2. Whether California Civil Code §232(a)(4) is unconstitutionally vague because it delegates basic policy matters to judges for resolution on an ad hoc and subjective basis when it allows the trial judge to determine whether the facts of a particular crime prove unfitness to be a parent in the future.

3. Whether the charging allegations of the petition to terminate the Appellant's parental rights were so deficient as to violate the notice requirements of due process.

(b)

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(d)

OPINIONS DELIVERED IN THE COURTS BELOW

Judgment of the trial court terminating Appellant's parental rights (Clerk's Transcript on Appeal, Pages 154 to 161 [C.T. 154-161], set forth in full in Appendix A). The California Court of Appeal Opinion (set forth in full in Appendix B). The California Supreme Court denial of review (set forth in full in Appendix C).

None of the decisions of the courts below are officially reported.

(e)

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i)

NATURE OF THE PROCEEDING

After he was released from prison, Appellant's parental rights were terminated upon the ground that he had been convicted of unlawfully taking, detaining, and concealing his child from his former wife, and upon the ground that he had been convicted, for the same incident, of violating a custody and visitation order.

The trial court and Court of Appeal specifically rejected Appellant's claim that the statute used to terminate his fundamental right of parenting failed to withstand strict scrutiny. The courts also rejected the Appellant's claim that there is not even a rational basis for the statute, much less a compelling need. However, the courts cited neither a compelling need nor a rational basis for treating felons differently from other miscreant parents. The California Supreme Court refused to review Appellant's contentions.

(ii)

JUDGMENT SOUGHT TO BE REVIEWED

The Opinion of the Court of Appeal of the State California, Fifth Appellate District (Appendix B), was filed on October 26, 1987.

Review was Denied without Opinion by the California Supreme Court (Appendix C) on January 20, 1988. Notice of Appeal was filed in the California Court of Appeal for the Fifth Appellate District on February 18, 1988 (Appendix D).

This Appeal is being docketed within 90 days of the California Supreme Court's denial of the Appellant's petition for review.

(iii)

STATUTORY PROVISIONS AND CASES SUSTAINING JURISDICTION

A judgment freeing a child from the custody and control of its parent results in the total severance of the natural ties between the parent and the child and amounts to the taking of "a liberty" under the due process clause of the United States Constitution (*Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 [1975]). In the present case the Appellant's parental rights were severed under a statute that provides for termination when the parent is convicted of a felony ". . .if the facts of the crime. . .are of a nature so as to prove the unfitness of the parent or parents to have future custody and control of the child." (California Civil Code §232(a)(4)).

Nothing in the statute provides explicit standards for those who apply it. However, without such standards, the statute is impermissibly vague because it delegates a basic policy matter — whether the facts of a particular crime prove parental unfitness for future custody — to judges for resolution on an ad hoc and subjective basis (*Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 [1972]). A lack of ascertainable standards is precisely what offends the due process clause (*Smith v. Goguen,* 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 [1974]). Nevertheless, California rejected the need for ascertainable standards.

The statute in the present case allows parents who are felons to be treated differently from other convicted parents. Therefore it creates a statutory classification subject to the compelling interest test because the result of the classification infringes upon the fundamental right of parenting (*Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 [1942]). There is no compelling state

interest satisfied by the statute. However, the California courts also specifically rejected the compelling interest standard of review for this statute.

This court's jurisdiction is therefore invoked under 28 U.S.C. §1257(2).

(f)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves California Civil Code §232, which is set forth in full in Appendix E because of its length. In particular, the case involves subdivision (a)(4), which provides:

> (a) Description of person. An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:
>
> (4) Person whose parents convicted of felony. Whose parent or parents are convicted of a felony, if the facts of the crime are of which the parent or parents were convicted are of such a nature so a to prove the unfitness of the parent or parents to have the future custody and control of the child.

The California Penal Code sections of which the Appellant was convicted for taking his child are P.C. §§278 and 278.5, which

provide:

> P.C. §278: Every person not having a right of custody, who maliciously takes, detains, conceals, or entices away any minor child with intent to detain or conceal that child from a person, guardian, or public agency having the lawful charge of the child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars ($10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.
>
> P.C. §278.5(a): Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

Two other statutes are involved to the extent that they peripherally support the Appellant's contentions. They are set forth in full in Appendix E because of their length. These statutes are California Penal Code §§273a and 647a.

(g)

STATEMENT OF THE CASE

This is an appeal from a judgment terminating the Appellant's parental rights pursuant to California Civil Code §232. The Court of Appeal affirmed the judgment, and the Supreme Court refused to hear the case. Therefore, the Court of Appeal Opinion is the final state action available to the Appellant.

STATEMENT OF FACTS

The parties were married on June 22, 1975, and their child, Stacy Lynn P. was born of the marriage on December 10, 1976 (C.T. 155/2-3). Debra filed her first Petition for Dissolution of Marriage in the State of Arizona on March 31, 1978. Two weeks later Debra filed a Complaint for Divorce in the State of Nevada. While both of these matters were still pending Debra filed an Order to Show Cause in Fresno County, California for sole physical custody of Stacy and for supervised visitation, limited to the petitioner's presence (Augmented Record, [A.R. /1-5]). In her declaration she did not inform the California court that jurisdiction had already been established in two other states (A.R. /3-4).

On September 1, 1987, the first time in nearly six months that John was allowed any meaningful visitation with his daughter since Debra fled to California after filing in three states: Arizona, Nevada and California, John took Stacy and left California (Reporter's Transcript, page 24/15-25/11). Ten months later, John and Stacy were found in Colorado in August 1979, by Debra's private investigator (R.T. 28/14-29/6).

John was not allowed to see his daughter at all for eight months, until April 1980 (R.T. 38/3-11), when he was allowed to start seeing her for one hour per month in the office of Debra's psychologist (R.T. 38/11-22). John became convinced that Debra's psychologist was biased against him, so he tried to modify the visitation arrangements. Twenty-two months after he returned to California, he was finally able to modify the order to allow a different psychologist to supervise the monthly one-hour visitations, starting in May, 1981 (R.T. 595/23-596/4; 576/21-577/3).

After numerous attempts to expand visitation over a period of thirty-eight months, John was finally allowed limited unsupervised visitation. On October 23, 1982, John picked up Stacy for a scheduled visit and fled California (C.T. 156/13-15). He remained in hiding until he was found in Florida on March 2, 1983 (C.T. 156/22-23).

John then voluntarily returned to California and submitted himself to arrest. On December 16, 1983, John was sentenced to serve three years in state prison for his conviction of violating Penal Code §§278 and 287.5 (C.T. 156/27-157/6). No criminal charges

were ever filed as a result of the first taking, probably because the California Court did not have jurisdiction to enter the first custody order.

On October 25, 1984, Debra filed a petition to free Stacy from John's custody and control under Civil Code §232 so that Debra's next husband could adopt Stacy (A.R. /30-31).

After he had served his prison sentence, on April 10, 1985, John filed a notice of motion for an order for psychiatric evaluation of Stacy (A.R. /32-43). The motion was denied on June 6, 1985 (A.R. /44, 45; R.T 59/9-19). After a six day trial, the court found that

> "It is difficult to conceive of another felony conviction that shows greater 'unfitness of the parent' than the instant offense." (C.T. 159/27-160/1).

Since this dispute began in March 1979, each parent has attempted to prevent the other from seeing their daughter. Debra started it by preventing meaningful contact for six months (R.T. 142/24-142/11). John retaliated by keeping Stacy from seeing Debra for ten months (R.T. 28/14-19). Then Debra completely kept John from seeing Stacy for eight months, followed by expensive one hour visits per month supervised by a pyschologist for thirty months (R.T. 38/11-22; 38/11-45/; 577/4-8). John then kept Stacy away from Debra for five months (R.T. 48/7-18). Finally, it was Debra's turn again, and she has kept Stacy away from John for over four years now (R.T. 51/14-21). The net result of all of this is that since Debra took Stacy and fled to California, there has never been a "normal" visitation arrangement between these parents and their child.

In the trial court, the Court of Appeal, and in the state Supreme Court John argued that Civil Code §232(a)(4) unconstitutionally discriminates against felons because there is no compelling need to treat felons differently from other convicted parents, especially where the crime involved can be classified as either a felony or a misdemeanor. The court's response was to reject the strict scrutiny standard of review without stating any legal reason for rejecting strict scrutiny, and to simply state that there was a rational basis for the distinction. The court never did state what the rational basis was.

John also argued in the trial court, the Court of Appeal, and state Supreme Court that Civil Code §232(a)(4) is unconstitutionally vague in that it fails to set forth specific areas of criminal conduct which by their very nature suggest parental unfitness. The court responded that §232 is not vague when it is read as a package in conjunction with the penal code. In essence, the court held that the elements of the crime supply the needed ". . .facts of the crime . . .to prove the unfitness of the parent. . .to have future custody . . ." In other words, the name of the crime is enough.

John also argued in each court below that the Petition to terminate his parental rights failed to allege facts sufficient to inform him of the charges he was required to meet. John contended that when this was combined with the denial of his motion for appointment of an independent mental health professional to examine his daughter, he was denied a fair trial. The court held that since the petition recited the name of the crime, date of conviction, and the fact that his own child was involved, he was given sufficient notice of the issues.

The court also held that since John was allowed to submit written questions to Debra's expert (which the expert was allowed to rewrite before he answered [A.R. 44/27-45/6]), and since John was allowed to tape record a session between the expert and the child (the expert's tape recorder did not pick up the child's voice [R.T. 387/2-4]), John was not deprived of a fair trial. The court did not address the fact that the expert had concealed the information that his office is equipped with a room for one-way viewing (R.T. 402/6-10). John's expert could have directly observed the session if the court had allowed free access to all of the evidence and issues involved in the case.

(h)

THE QUESTION OF APPELLANT'S PARENTAL RIGHTS IS SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW BECAUSE CALIFORNIA LACKS EITHER A COMPELLING NEED OR RATIONAL BASIS FOR THE VAGUE STATUTE USED TO TERMINATE HIS PARENTAL RIGHTS

Parents possess fundamental rights in the custody, care, and nurture of their children (*Stanley v. Illinois*, 405 U.S. 645, 651-652

[1972]). State regulations which allow for infringement upon these fundamental rights can only be justified by a compelling state interest upon strict judicial review. Even the California Supreme Court has affirmed these constitutional standards.

> "[I]n cases involving 'suspect classifications' or touching on *'fundamental interests'*, (footnotes omitted) the court has adopted an attitude of active and critical analysis, subjecting the classification to *strict scrutiny*. (Citations omitted.) Under the strict standard applied to such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the *distinctions drawn* by the law are *necessary to further its purposes*. (emphasis added)" (*Serrano v. Priest* 5 Cal.3d 584, 597 [1971]).

However, in the present case, the California courts have refused to apply these settled standards. John contends that the improper application of Civil Code §232(a)(4), as in the instant case, gives rise to a threshold discrimination against parents who have suffered a felony conviction.

John was convicted of violating Penal Code §278 and §278.5. However, he contends that the harm to society and to Stacy caused by the takings is no serious than the harm protected by Penal Code §273(a)(2) or §647a. Therefore, the non-penal consequences should be no more serious.

Penal Code §273(a)(2) protects children from willful infliction of physical pain or mental suffering, willfully permitting the child's person or health to be injured, or willfully placing the child in danger. At the very most, the evidence in the present case establishes no more harm to society and to Stacy than is protected by this section. As a matter of fact, the primary emphasis of Debra's evidence was related to the "mental suffering" that Stacy was allegedly subjected to. However, §273(a)(2) is a misdemeanor, the conviction of which would not support termination of John's parental rights.

Penal Code §647a protects children from being molested. As long as the offense is not committed after breaking into a dweling, it is a misdemeanor and would not support termination of parental rights, even though the harm to the child is certainly extremely serious.

John was convicted of taking Stacy from her mother, the person entitled to custody of Stacy (P..C. §278), and of concealing Stacy in violation of a custody order (P.C. §278.5). The evidence demonstrated no more than the prima facie case under the statutes. He took her, moved to various places, changed their names and appearances, and tried to avoid being found by Debra. He received a felony sentence for his conviction. However, both offenses could have been sentenced as misdemeanors (P.C. §§278 and 278.5).

In answering John's due process and equal protection arguments, the California courts should have adopted an attitude of active and critical analysis, and should have subjected the classification to strict scrutiny (*Skinner v. Oklahoma,* 316 U.S. 535 [1942]; *Serrano v. Priest,* 5 Cal.3d. 584 [1971]). However, without stating its reason, the Court of Appeal in the present case gave only lip service to the correct standard of review by noting that where a classification is drawn along lines which touch upon a fundamental interest, strict scrutiny is required. The Court of Appeal, however, did not apply the strict scrutiny analysis.

The Court of Appeal did not determine that the state had a compelling reason to justify treating parents who were convicted of violating Penal Code §§278 and 278.5 differently from parents who willfully caused their child to suffer. The Court did not determine that the state had a compelling reason for treating them differently from parents who willfully inflict physical pain and mental suffering on their children. The Court did not determine that the state had a compelling reason for treating them differently from parents who willfully cause the child to be injured. And, it did not determine that the state had a compelling reason for treating them differently from parents who willfully place their children's health in danger. Each of these offenses is a misdemeanor under Penal Code §273a(2). Further, the Court of Appeal did not determine that the state had a compelling reason for treating parents convicted of violating Penal Code §§278 and 278.5 differently from parents who molest their children, a misdemeanor under Penal Code §647a.

Other than the giving of mere lip service to the correct standard of review, all the Court of Appeal did was to use the standard of review which is appropriate when ordinary, as opposed to fundamental, rights are involved. As any law student would probably recognize, once a reviewing court decides that the rational basis standard will be used, the statute will survive the challenge.

However, in the present case, the Court of Appeal did not even recite a rational basis for applying the distinction to John.

There is no logical reason, never mind a compelling state need, why John's parental rights should be terminated just because the District Attorney had, three years earlier, decided to file a felony case instead of a misdemeanor case (both P.C. §§278 and 278.5 can be misdemeanors). There is no logical reason why John's parental rights should be terminated because three years earlier the criminal court judge sentenced John to state prison rather than to the county jail, which would have made the offense a misdemeanor. These distinctions have no apparent relationship to parental fitness, either current or future, and are certainly not necessary to further any compelling state interest.

It is axiomatic that the equal protection and due process clauses abhor distinctions based upon irrational classifications which infringe upon fundamental rights. (See *Stanley v. Illinois,* 405 U.S. 645 (1972); *Shapiro v. Thompson* 394 U.S. 618 (1969); *Serrano v. Priest, supra.* 5 Cal.3d 584). A classification must be reasonable and not arbitrary. It must rest upon some ground of difference having a fair and substantial relation to the object of the legislation (*Royster Guano Co. v. Virginia,* 253 U.S. 412 [1920]).

Had the District Attorney filed a misdemeanor case, or had John received a county jail sentence, without any other changes in the facts of this case, the grounds for termination under §232(a)(4) would not have been even arguably satisfied. Therefore, the application of Civil Code §232 may result in the absolute severance of the parent-child relationship based solely upon the status of John as a felon.

There is no rational basis, much less a compelling need, to terminate John's parental rights simply because the District Attorney filed a felony, or because the criminal court judge sent John to prison rather than to jail. When Civil Code §232(a)(4) is applied to parental child stealing punished as a felony rather than a misdemeanor, it creates an irrational classification. Since that irrational classfication was used in the present case to infringe upon John's fundamental parental rights, it offends the equal protection and due process clauses of the United States Consitution. Therefore, the Supreme Court should determine that California Civil Code §232(a)(4) unconstitutionally denied Appellant equal protection

and due process of law when the statute was used to terminate his parental rights.

(i)

THE QUESTION OF APPELLANT'S PARENTAL RIGHTS IS SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW BECAUSE CIVIL CODE SECTION 232(a)(4) IS UNCONSTITUTIONALLY VAGUE IN THAT IT DELEGATES BASIC POLICY MATTERS TO JUDGES FOR RESOLUTION ON AN AD HOC AND SUBJECTIVE BASIS

The vagueness doctrine applies to civil as well as criminal proceedings. Moreover, where a statute threatens or circumscribes the exercises of a fundamental right, its language must be even more precise and readily understandable. (*Smith v. Goguen* 415 U.S. 566 [1974]).

There can be no doubt that the parent-child relationship is a fundamental liberty interest entitled to due process protection. The interests of natural parents in the care, custody, and management of their children do not evaporate simply because they have not been model parents or have lost temporary custody of their child (*Santosky v. Kramer* 455 U.S. 745, 753 [1982]).

In the case of *Grayned v. City of Rockford* 408 U.S. 104, 108-109 (1972), this court held:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. . . Vague laws may trap the innocent by not providing fair warning. [Footnote omitted.] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [Footnote omitted.] **A vague law impermissible delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis,** with the attendant dangers of arbitrary and discriminatory application. [Footnote omitted.]" (Empasis added.) (See also "Void for Vagueness Doctrine in the Supreme Court" 109 U.Pa.L.Rev. 67 [1960])

John contends that the language of Civil Code §232(a)(4) is not only an example of a vague law that invites an ad hoc determination of basic policy matters, but that the statute virtually requires ad hoc and subjective policy decisions. However, it is for the legislature to determine whether child stealing should result in termination of parental rights. It should not be left to the District Attorney as a part of his charging discretion, and it should not be left to criminal trial judges as part of their sentencing discretion. The state legislature did not provide for termination when it recently added Penal Code §278.5, which it certainly could have under its basic power to determine social policy.

California Civil Code §232(a)(4) provides:

> "(a) an action may be brought for the purpose of having any child under the age of eighteen years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:
>
> (4) whose parent or parents are convicted of a felony, if the **facts of the crime** of which the parent or parents were convicted are of a nature so as to **prove the unfitness** of the parent or parents to have the **future custody** and control of the child (emphasis added)."

The statute is silent with respect to those crimes which implicitly suggest or give rise to an inference that the parent will be unfit to have custody in the future. Therefore, the statute is open to arbitrary and capricious application.

One court may determine that when a parent takes his child, changes her name and appearance, moves to various locations, and generally tries to avoid being found by the other parent, then the offending parent will not be fit to have custody in the future. This is what happened in the present case.

Another court might consider that Debra's efforts to frustrate visitation, including taking the child from her home and moving her to a different state, simultaneous filing in the courts of three different states, violating the custody orders of the first two states, refusing to allow visits for nearly six months, demanding supervision of visitation, and changing the child's name as provocation or as substantial mitigating factors, and refuse to terminate parental

rights. Because of the unfortunate language of §232(a)(4), it would be difficult to say which court, if either, would be wrong. The reason is quite simply that the statute is vague.

In the present case, the California courts held, in essence, that the entire complex of the penal code may be read into Civil Code §232(a)(4) to cure the ambiguity and solve the vagueness problem. However, that argument has already failed constitutional muster. In a parental rights case involving a similar issue, the state argued that the statutory procedure should be evaluated as a package, and that as thus evaluated, the package was constitutional (*Santosky v. Kramer*, 455 U.S. 745 [1982]). In response, this court squarely held that a constitutionally defective standard is not excused by an amorphous assessment of the "cumulative effect" of state procedures. The same is true for the present case.

Whether or not it is a reflection of an arbitrary application of the statute, John has not been able to find any other case, either in California or in any other state, where the court terminated the offending parent's rights so that the other parent's next husband could adopt the child.

It is conceivable that, under certain limited circumstances, a criminal conviction may evidence a parent's inability to provide effective child rearing, both in the present and in the future. However, if the legislature seeks to utilize criminal behavior as a criteria for measuring parental unfitness, a more appropriate and definite statutory scheme is mandated by the due process protection of the United States Constitution. As it applies to parental child stealing, if the legislature wanted to terminate parental rights as punishment, it would have said so when it recently added Penal Code §278.5.

As it stands now, Civil Code §232(a)(4) is unconstitutionally vague and may not properly be applied to terminate John's parental rights because it does not provide **explicit standards** for determining which "facts of the crime. . .are of a nature so as to prove unfitness of the parent. . .to have future custody. . ." As §232(a)(4) now stands, it is so **vague** that it essentially allows an ad hoc arbitrary determination that John's fundamental rights may be terminated without due process of law. Because of this constitutional deficiency, it may not be used to terminate his parental rights, and the decision must be reversed.

The Court of Appeal answered this argument by pointing to the classic rule that a statute is not vague if it can be made certain by reference to other definable sources. The Court of Appeal then pointed to the elements of Penal Code §278 as being sufficient to make Civil Code §232(a)(4) definite. However, the Penal Code does not describe "facts of the crime." All the Penal Code does is establish the elements of the crime. And, even if it did establish the facts of the crime, John contends that a constitutionally vague statute cannot be excused by an amorphous assessment of the cumulative effect of the package consisting of Civil Code §232 and the Penal Code.

The Court of Appeal essentially repeated the trial court's error of holding that the name of the crime is sufficient to fulfill the requirements of Civil Code §232(a)(4). However, this is a basic policy determination that may not be left to policemen, prosecutors, judges or juries. This is a matter for the legislature (*Grayned v. City of Rockford,* 408 U.S 104 [1972]). Therefore, the Supreme Court should determine that the statute is unconstitutional because it is so uncertain as to allow basic policies to be set by prosecutors and judges.

(iii)

THE QUESTION OF APPELLANT'S PARENTAL RIGHTS IS SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW BECAUSE THE CHARGING ALLEGATIONS OF THE PETITION WERE SO DEFICIENT AS TO VIOLATE THE NOTICE REQUIREMENTS OF DUE PROCESS

The petition and amended petition alleged that John's parental rights should be terminated under Penal Code §232(a)(4) because he had suffered conviction of two felony counts of kidnapping Stacy, and for that reason was unfit to have custody. However, there were no allegations concerning the "facts of the crime." Nevertheless, the bulk of Debra's case was based upon alleged psychological harm to Stacy occasioned by the takings.

John contends that if due process means anything, it means that he is entitled to a fair trial, and fairness includes notice of the particular allegations that would be used against him and a reasonable opportunity to meet those allegations. However, in the present case, he was denied both. He was not allowed to adequately

prepare for the psychological allegations that controlled the case, and which were not alleged in the petition.

Fundamental to due process is the right to notice of the allegations upon which the deprivation of custody is predicated. In juvenile court preceedings, where the "parent's right to. . .custody [is] at stake," due process demands that the youth and his parent be given notice "of the **specific issues** they must meet." (*In re Gault*, 387 U.S. 1 [1967]). Surely in a termination case, where the consequences are permanent, a parent must be given at least as much notice. If fundamental due process requires notice of **specific allegations** in a dependency proceeding, then it **must** require such notice in a termination proceeding, where the potential effect on the parent-child relationship is much more devastating. A dependency case may result only in temporary loss of child custody; a decree of adoption results in the complete and final termination of the parent-child relationship, relieving the natural parent of all parental rights and responsibilities with regard to the adopted child (*Estate of Jobson*, 164 Cal. 312, 316-317 [1912]).

In the present case, the real issue was whether Stacy would suffer psychological detriment if she were allowed to have further contact with her father. However, there was nothing in the petition concerning her mental health. Since this was the specific issue which determined the case, John was entitled to notice.

The material charging allegations in the petition in the present case are as follows:

> "5. The subject minor should be freed from the custody and control of the natural father on the basis of the following:
>
> (c) On or about February 15, 1984 (sic.), the natural father, John R. [P], Jr., was convicted of three (sic.) felony counts of kidnapping of the child and sentenced to prison for a term prescribed by law; by reason thereof, John R. [P], Jr., is unfit to have custody of the minor child." [John was actually convicted of two counts arising from a single taking].

Due process does not begin and end with the receipt of a citation (*In re B.G.* [1974] 11 Cal.3d 679, 688-689, 114 Cal. Rptr. 444). Paragraph 5(c) of the petition is deficient as a matter of law because it fails to allege any of the "facts of the crime" (Civil Code

§232[a][4]). It is mere recital of the fact of conviction, which is insufficient. Further, the petition is insufficient as a matter of law because it fails to allege **facts** sufficient to put John on notice of the specific allegations that he must meet (*In re Gault, supra*).

John contends that the phrase "facts of the crime" means more than simply the name of the crime, which is all the petition really alleged. Perhaps if the petition had alleged that Stacy had suffered some particular form of emotional distress as a result of the taking, then the court would not have refused John's pre-trial request for access to Stacy's emotional state through a psychiatric evaluation.

The Court of Appeal in the present case agreed with the appellant's legal contention. However, the Court held that the felony directly involved his child, and the allegation of the "kidnapping" imparted sufficient knowledge and notice to allow him to defend against the charges. John submits that the Court of Appeal again mistakes the name of the crime for the "facts of the crime." All the petition alleged was some of the elements of the crime. At the trial, the great bulk of the petitioner's evidence concerned the alleged psychological impact the taking had on Stacy. However, John was not put on notice by the petition that he would be required to overcome allegations of emotional harm to his daughter. For this reason, the Supreme Court should determine that a petition filed under Civil Code §232(a)(4) that merely recites the fact of the conviction is insufficient to satisfy the due process notice requirement.

CONCLUSION

Civil Code §232 should not be used to resolve this custody dispute. John has been severely punished under the criminal law, and there has been absolutely no evidence of any misconduct on his part since he was sent to prison. He has learned his lesson. There is no rational basis, much less a compelling need, to terminate John's parental rights simply because the criminal court judge sent John to prison rather than to jail. When Civil Code §232(a)(4) is applied to parental child stealing punished as a felony rather than a misdemeanor, it creates an irrational classification. Since that irrational classification was used in the present case to infringe upon

upon John's fundamental parental rights, it offends the equal protection and due process clauses of the United States Constitution. Therefore, the Supreme Court should determine that strict scrutiny applies, and that the statute violates the constitutional equal protection and due process clauses.

Civil Code §232(a)(4) is unconstitutionally vague and may not properly be applied to terminate John's parental rights because it does not provide explicit standards for determining which "facts of the crime. . .are of a nature so as to prove unfitness of the parent . . .to have future custody. . ." As §232(a)(4) now stands, it is so vague that it essentially allows an ad hoc and arbitrary determination that John's fundamental rights may be terminated without due process of law. Therefore, the Supreme Court should declare that the statute is unconstitutionally vague and therefore violates due process.

Finally, John contends that if due process means anything, it means that he was entitled to a fair trial, and fairness includes notice of the particular allegations that would be used against him and a reasonable opportunity to meet those allegations. However, in the present case, he was denied both.

The petition alleged virtually nothing more than the name of the crime. A bare recital of the conclusionary words of the statute does not suffice as notice. John was forced to guess about the specific allegations that he was going to be required to answer. And then he was denied a reasonable opportunity to adequately prepare independent psychological evidence for his defense. Therefore, the Supreme Court should determine that John was denied the due process right to notice and a fair trial.

Dated: April 15, 1988.

Respectfully Submitted,

Jim T. Elia

JIM T. ELIA
Counsel for Appellant

APPENDIX A

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FILED
August 4, 1986
Fresno County Clerk
J.D. Jensen
Deputy

Attorney for Debra L. Bowman

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

In re the Matter of the Petition of: DEBRA L. BOWMAN, on behalf of STACEY LYNN PANEK, a minor for freedom from parental custody and control.	CASE NO. 31959-2 JUDGMENT

The above entitled matter came on regularly for hearing on November 18, 1985. Petitioner, DEBRA L. BOWMAN, appeared in person and with counsel, DIANNE R. OPHELIA; Respondent, JOHN R. PANEK, appeared in person and by counsel, JIM T. ELIA; the minor child, STACY L. PANEK appeared by counsel, CAROLYN M. MORSE. Evidence, both oral and documentary, was presented. After the conclusion of the presentation of evidence, a briefing schedule was agreed upon by counsel and the court. Counsel filed their respective briefs, and the matter was deemed submitted ten (10) days after the submission of the last brief on

filed on January 31, 1986, Petitioner's Closing Brief, there being no response.

The matter now having been carefully considered by the court and good cause appearing therefore, the court makes the following findings:

Petitioner and Respondent were married on June 22, 1975. The minor was born of the marriage on December 10, 1976 in Phoenix, Arizona. After experiencing marital difficulties, dissolution petitions were filed in Arizona, Nevada and California in 1978. At the time of separation, Petitioner and the Minor lived in Phoenix; in July of 1978, Petitioner filed for dissolution of marriage in Fresno County (see Case No. 231701-4, of which counsel stipulated the Court could take judicial notice) and was awarded temporary custody of the Minor. Respondent was given visitation rights on weekends and was ordered not to take the child outside of Fresno County. The first weekend of September 1978, Respondent picked up the Minor but failed to return her the following Monday. Subsequently, Petitioner reported the failure to return to authorities and hired a private investigator to search for her daughter. The evidence indicates that the taking of the minor was well-planned, including a change of identity and traveling to Canada and establishing a residence, and then establishing a residence in Denver, Colorado. After an extensive and expensive search by Petitioner's private investigator, the Minor was eventually located in Denver on June 22, 1979. Respondent was using the fictititous name of Joe Banek at the time. Petitioner had no contact whatsoever with her daughter during this 11-month period.

Petitioner and minor began counseling sessions with Dr. Allan G. Hedberg in January 1980. Eventually, Respondent was incorporated into the sessions, and after a December 12, 1980 Court Order, Respondent participated in monthly visitations with the Minor, First at Dr. Hedberg's office and later transferred to Link Care Center at Respondent's request. No overnight visitation was permitted.

Respondent apparently became dissatisfied or suspicious of Dr. Hedberg, and sought an independent evaluation by Dr. Larry N. Ferguson on December 5, 1980.

Visitation was expanded on March 5, 1982 for three-hour Wednesday afternoon visitations between Respondent and the

Minor, in addition to individual therapy sessions by Petitioner and Respondent with Dr. Hedberg. Respondent's visitation rights were later expanded to include evening visitation on the condition that he not leave the Fresno area with the minor. On October 23, 1982, within two months of the time he was given expanded visitation rights, Respondent again took the Minor and failed to return. The evidence indicates that Respondent was even better prepared for this taking, including changing his name and that of his daughter, changing their appearances, including color and hair style. Respondent took the child out of State, settling briefly in Mississippi, and eventually residing in the Fort Lauderdale, Florida area. Petitioner again hired a private investigator, and at great cost and effort, Respondent and the Minor were again found in Fort Lauderdale on March 2, 1983. At that time, Respondent was using the same name John Prince and had changed his hair style and hair color. The Minor's jacket bore the same name "Stacey Prince".

Respondent was subsequently found guilty after jury trial on November 16, 1983 in Fresno of two felonies, i.e., child stealing (Penal Code §278) and violation of a Court Order regarding custody (Penal Code §278.5) and was sentenced to State Prison on December 16, 1983. (See Case No. 299992-8, of which counsel stipulated the Court could take judicial notice.) He was released on parole on February 17, 1985. Respondent now resides in Florida.

The matter is before the Court on an Amended Petition to Declare Minor Free from Paternal Custody and Control, alleging two grounds for termination:

(1) The Minor's natural father has not communicated with the minor since November, 1983, nor made provisions for support of the minor since January, 1980, a period of over one year with the intent to abandon the child, and

(2) On or about February 15, 1984 (sic), Respondent was convicted of two felony counts of kidnapping of the Minor and sentenced to prison for a term prescribed by law, and by reason thereof, is unfit to have custody of said Minor.

Regarding the first grounds, the Court finds that although there are significant periods of time when the Respondent had no communication with the Minor and made no child support payments, it is unable to find an entire year when such was the case. The longest period of time where the Respondent did not communicate

with the Minor or provide her with support was from the time the Minor was recovered in Florida on March 21, 1983, and the time the Petition was filed on October 25, 1984. However, Respondent was incarcerated for a good portion of that time. Thus, Respondent was essentially prevented from any meaningful communication with Minor. The record indicates Respondent apparently wrote the Minor some letters. This basis for termination of Respondent's parental rights must fail, however, because there is no showing that Respondent ever intended to abandon the child. Further, although Respondent also failed to make regular child support payments, often having the ability to do so, the record again does not establish by clear and convincing evidence that he did so with the intent to abandon the child. Rather, it appears that Respondent was again attempting to vex Petitioner, whom he viewed as threatening his visitation rights.

Petitioner's second basis for terminating Respondent's parental rights is based on his felony conviction. Civil Code §232(a)(4) provides that a minor may be declared free from the custody and control of either or both parents when a parent is:

> ". . .convicted of a felony, if the facts of the crime of which the parent. . .[is] convicted [is] of a nature so as to prove the unfitness of the parent. . .to have the future custody and control of the child."

The evidence is undisputed that Respondent took the child on October 23, 1982, and that he went through a rather elaborate scheme to conceal his whereabouts and to prevent Petitioner from ever finding the Minor again. The facts of the crime, the deception, evasion, changes of name, identification, and physical appearance, all show the Respondent's intent to permanently deprive the child of contact with her mother. Dr. Hedberg and Family Court Services Investigating Officer Wayne Couvillion testified about the devastating psychological harm that deprivation of parental contact can have on a child. This harm is especially acute when the Respondent had previously taken the child and had prevented contact with the mother for approximately eleven months.

While this court expressed some concern regarding an indication of possible bias on the part of Dr. Hedberg, the court in reexaming the evidence finds the factors cited by Respondent that allegedly show bias on the part of Dr. Hedberg, are often taken out of context

or are of limited, if any, probative value. The Court accepts Dr. Hedberg's conclusions regarding the extensive harm to the child as a result of the kidnappings, and the future harm to the child should she be required to maintain future contact with the father.

Mr. Couvillion also provided compelling testimony that the Minor's greatest need was to have this matter resolved and to be adopted, so as to provide her with the security and stability she needs.

In the criminal case (Case No. 299992-8), Respondent admitted taking the Minor in violation of a Court Order, but felt he was justified because he claimed the child was not treated properly by her mother; the child was not well and appeared in a daze, non-responsive state; the mother indicated to Petitioner she did not want the child; and he was not being given adequate visitation rights and attempted visits that had been thwarted by Petitioner.

It is difficult to conceive of another felony conviction that shows greater "unfitness of the parent" than the instant offense. Respondent cites *In re Jame M.* (1976) 65 Cal.3d 254 as support for his assertion that the Petitioner has established nothing more than the conviction itself. In that case, the father murdered the mother. The Court held that the murder of the mother might be evidence of unfitness in particular circumstances, but then went on to note that the Trial Court found the crime to be one of passion. Also, the mother was dead and unavailable for future custody of the child.

The situation in the present case is entirely different. Repondent's felony conviction is based on a meticulously planned and deliberate attempt to deprive the child of future contact with the mother, and followed a similar episode that prevented contat between Petitioner and Minor for approximately eleven months.

It is evident that termination of Respondent's parental rights is in the Minor's best interest, and that failure to do so would be detrimental to the child. The Minor clearly needs a father figure in her life, but she has that with her stepfather. She needs to know that her stepfather will be her father for the rest of her life, and that she need not fear or be concerned with another kidnapping by Respondent.

There is no less restrictive alternative available. Respondent has previously had opportunities in the past to continue to reestablish contact with his daughter, and has instead taken the Minor from a stable and nurturing environment and denied her from any contact with the child's mother. Another attempt to reestablish ties, which admittedly will take years even to have meaningful visitation, is too high a price for the Minor to pay. She has already suffered irreparable harm, and needs to be in a setting that does not include future contact with Respondent. A review of the record available to the Court indicates unequivocally that Respondent considers himself above the law, and is totally disinterested in and undeterred by Court Orders. While claiming to be guided by and concerned only with his daughter's well-being, it is obvious that Respondent's unhealthy obsession with the Minor has blinded him to the tremendous irreparable damage he has inflicted on the Minor.

The Court finds by clear and convincing evidence that Respondent has been convicted of a felony which proves his unfitness to have future custody and control of the Minor.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Respondent's parental rights to the minor child, STACEY L. PANEK, born December 10, 1976, are terminated. Said minor is free to be adopted by her stepfather.

APPROVED AS TO FORM:

DATED: _____

_____

JIM T. ELIA, Attorney for
Respondent

DATED: 8/1/86

/s/ MARIO OLMOS

JUDGE OF THE SUPERIOR COURT

APPENDIX B

Court of Appeal
Fifth Appellate District
FILED
October 26, 1987
by Kevin A. Swanson, Clerk
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re STACEY LYNN P., a Minor.

DEBRA L. B.,
Petitioner and Respondent,

v.

JOHN R. P., JR.,
Objector and Appellant.

No. F007984

(Super. Ct.
No. 319592-2)

OPINION

APPEAL from a judgment of the Superior Court of the County of Fresno. Mario Olmos, Judge.

Douglas B. Cone for Objector and Appellant.

Dianne R. Ophelia for Petitioner and Respondent.

Robert Ishikawa, under appointment by the Court of Appeal, for Minor.

This is an appeal from a judgment declaring Stacy Lynn P. (Stacy) free from the custody and control of her natural father, John R. P., Jr. (appellant) [1]/ Appellant contends that: (1) the trial court abused its discretion in terminating his parental rights; (2) Civil Code section 232, subdivision (a)(4) [2]/ unconstitutionally discriminates against felons; (3) section 232, subdivision (a)(4) is unconstitutionally vague; (4) a jury should have been allowed to determine appellant's fitness to retain parental rights; and (5) lack of notice and denial of appellant's motion for appointment of an independent mental health professional to examine Stacy constituted denial of a fair trial. We decide each of these issues adversely to appellant.

THE CASE

On October 25, 1984, a petition was filed by Debra L. B. (Debra), mother of Stacy, to declare Stacy free from the custody and control of appellant under section 232. On November 8, 1985, Debra filed an amended petition.

On November 18-22 and 27, 1985, a hearing was held on the amended petition. At the conclusion of the presentation of evidence, a briefing schedule was agreed upon. The matter was deemed submitted 10 days after the submission of the last brief which was ultimately filed on January 31, 1986.

A tentative decision was filed on April 30, 1986, and on August 4, 1986, the trial court filed its judgment granting the petition and ordering that appellant's parental rights to Stacy be terminated and that the minor be free to be adopted by her stepfather.

THE FACTS

Stacy was born on December 10, 1976, the only child of the marriage of Debra and appellant.

In April 1978, Debra telephoned appellant in Las Vegas, Nevada, informing him she was returning from Phoenix, Arizona, to Fresno with Stacy. Appellant immediately traveled to Phoenix where an altercation ensued between appellant, Debra and Debra's mother.

1/ First names of the parties are used herein to preserve their anonymity.

2/ All statutory references are to the Civil Codes unless otherwise specified.

Appellant placed Stacy in his car and drove away even though Debra's mother was holding onto the car; she was dragged 30 feet before falling off. Debra filed a petition for a writ of habeaus corpus in Las Vegas and eventually received custody of Stacy and moved with her to Fresno.

Appellant did not see Stacy for a period of three months after Debra moved into her mother's residence in Fresno. Debra testified appellant telephoned while she was living with her mother, but he never requested to see Stacy during those three months. Thereafter, appellant would arrive at Debra's residence sporadically, unannounced, at late hours of the night.

In July 1978, Debra filed a dissolution action in the Fresno County Superior Court.[3] By order of that court, care and custody of Stacy was awarded to Debra and regular visitation was awarded to appellant.

At the time of appellant's initial visit with Stacy on September 1, 1978, he indicated he planned to take her to his mother's house in Long Beach on Friday and to return to Fresno on Monday. They failed to return and Stacy, then less than two years old, did not see her mother for almost a year.

Due to the efforts of a private investigator hired by Debra, appellant and Stacy were located in Denver Colorado, in August 1979. While in Denver, appellant had assumed several aliases. Debra testified Stacy suffered phychological distress as a result of this incident and Dr. Allen Hedberg was retained to counsel Stacy and Debra.

In October 1979, Debra obtained a court order barring visitation by appellant. In April 1980, appellant obtained a modified order for supervised visitation in Dr. Hedberg's office. In May 1981, appellant was permitted one hour monthly visits at Link Care Center, supervised by Dr. Larry Ferguson. These monthly visits extended over an 11-month period. Dr. Ferguson testified the relationship between the appellant and Stacy appeared to be a loving one.

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[3] Debra filed for divorce in Arizona on March 31, 1978, and in Nevada on April 14, 1978.

After several court appearances in the summer of 1982, appellant was granted limited unsupervised visits with Stacy. In October 1982, appellant picked up Stacy for a visit and once again kidnapped her. The next time Stacy saw her mother was five months later after the same private investigator located Stacy and appellant in Fort Lauderdale, Florida. Appellant had used another false name and had changed his and Stacy's hair styles and hair color.

Appellant was arrested on a kidnapping warrant issued by the Fresno County Superior Court. The arresting officer testified that it appeared Stacy and appellant loved each other very much and that Stacy had been well taken care of by appellant.

After a jury trial, appellant was convicted of child stealing (Pen. Code, §278) and violating a court order (Pen. Code, §278.5) and sentenced to three years in state prison.

Debra remarried in 1984 and Debra's new husband has assumed the role of father in Stacy's life since that time. He has filed a petition to adopt Stacy.

Dr. Hedberg testified that in his opinion Stacy was seriously disturbed when he first met her shortly after she was returned to Fresno in 1979. He described symptoms that "mimicked autism": avoidance of people, fear of people (men in particular), crying and irritability. He observed Stacy had not developed the language skills normally expected for her age nor was she relating normally to other children; she was withdrawn, avoided eye contact with others and would evince signs of fear; she suffered from nightmares, would eat only certain foods, and would urinate uncontrollably; and she was terrified of being left alone.

It was also Dr. Hedberg's opinion that Stacy's emotional symptoms originated from the abrupt departure and separation from her mother and whatever took place during her stay with her father. Hedberg indicated the age during which Stacy experienced the first kidnapping is an age at which children bond strongly with their caretaker. The sudden withdrawal of this caretaker, Debra, was traumatic for Stacy at this impressionable age. During this time, Stacy was switched from school to school, babysitter to babysitter. Even at the time of the trial, Dr. Hedberg noted, Stacy refused to talk about this period and would change the subject if it was broached.

Dr. Hedberg conceded that after the second kidnapping, Stacy's weight was good and she was talkative but, he noted, she entertained "quite a bit of scared feelings and fearful feelings," posessed a fear of being taken, cried more often, experienced nightmares and was unable to return to church or class. She also expressed fear of police. In Dr. Hedberg's opinion, Stacy had emotionally detached herself from her father and did not want to have any contact with him, and if forced to have contact "[i] t would be an emotional trauma for her" and "detrimental" and "it's in her best interest to not have that contact."

Dr. Hedberg concluded it would be in Stacy's best interest to allow her new stepfather to adopt her. He noted that less restrictive alternatives to termination of appellant's rights had been implemented and had been "violated very dramatically" by two kidnappings.

The Director of Fresno County Family Court Services, Wayne Couvillion, recommended the court terminate appellant's parental rights. His recommendation was based on two interviews with appellant, Debra and Stacy, a review of information from previous files on the case at family court services, a document from the attorney for appellant, information from the family support division and all other reports and documents available to him. He indicated it was Stacy's strong desire to be adopted and she was quite willing to have appellant's parental rights terminated as a condition of the adoption.

It was Mr. Couvillion's opinion that, due to Stacy's feelings toward appellant, "it would cause her problems if somebody told her she was going to have to visit with [him]." Mr. Couvillion was primarily concerned that Stacy have a stable relationship with a family. He did not see appellant as having such a role in the foreseeable future and if, hypothetically, three years from now appellant had the right to visit with Stacy, he did not see a relationship existing between them and did not see that such a "visitation would have any real meaning for the child. It would be basically a visit with a stranger for a short period of time that would have very little, if any, meaning to it." It would just be something that Stacy had to do because she would be told she had to.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TERMINATING PARENTAL RIGHTS

Appellant contends it was inequitable for the trial court to aid Debra in her "malicious attempts to deprive [him] of contact with Stacy," relying on three settled maxims of equity: (1) he who comes into equity must come with clean hands *(Womack v. Womack* (1966) 242 Cal.App.2d 572, 578-579); (2) no one can take advantage of his own wrong (§3517); and (3) between those who are equally right, or equally wrong, the law does not interpose. (§3524.)[4]/

Appellant complains that when Debra first filed for divorce in Phoenix, she falsely declared under penalty of perjury that she, appellant and Stacy had lived in Phoenix until November 1977, and that when, on April 14, 1978, while the Arizona action was still pending, she filed for divorce in Nevada, she declared she had been residing in Las Vegas for a little over a year prior thereto.

Both the Arizona and Nevada courts awarded appellant reasonable visitation. Although Debra claims she never violated the orders of either state requiring reasonable visitation, it is appellant's contention that she in fact violated those orders by restricting and withholding visitation from him.

Appellant argues that Debra repeatedly committed perjury and repeatedly perpetuated fraud on the courts by failing to divulge that other courts had jurisdiction over the matter being pursued. According to this argument, because Debra came to the present trial with "unclean hands," it was error to aid her in preventing appellant's future contact with his daughter, and because of her so-called perjury, "forum hopping" and misuse of the courts she should be prevented from taking advantage of her own wrong. (§3517). However, when an inequitable result would be accomplished by application of the "clean hands" doctrince, the courts have not hesitated to reject it. *(Womack v. Womack, supra,* 242 Cal.App.2d 572, 579; *Shaw v. Shaw (1964)* 227 Cal.App.2d 159, 166.)

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[4]/ Appellant contends the entire history of this case indicates that neither of the parents have acted particularly honorably.

The standard for our review was enunciated last year by this court in *In re Terry E.* (1986) 180 Cap.App.3d 932, 949:

> "Although we are required to affirm the judgment in a section 232 case if there is any **substantial** evidence to support the trial court's findings, in making this determination we must decide if the evidence is reasonable, credible and of solid value — such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence. [Citation.]"

The California Supreme Court in *In re Angelia P.* (1981) 28 Cal.3d 908, 919, pointed out that:

> "'Clear and convincing' evidence requires a finding of high probability. This standard is not new. We described such a test, 80 years ago, as requiring that the evidence be '"so clear as to leave no substantial doubt"'; '"sufficiently strong to command the unhesitating assent of every reasonable mind."' [Citation.] It retains validity today. [Citation.]"

In *In re Angelia P.*, the minor was declared free from the custody and control of her parents based on provisions of section 232, subdivisions (a)(2), (a)(4) and (a)(7) and on the following facts: The minor — who was three months of age at the time — was brought to a hospital emergency room with skull fracture which had occurred three days to two weeks before; she also had an older skull fracture; she suffered irremediable brain damage from the injuries; her father was convicted under Penal Code section 273a, subdivision (1), of willful cruelty to the minor, and sentenced to a term of one to ten years in state prison; the mother was described as passive and dominated by her husband.

After discussing, and rejecting the parents' various contentions, the court noted:

> "It is significant that [the father] has not challenged the trial court's ruling under subdivision (a)(4) of section 232, which permits termination on a finding that a parent was convicted of a crime of a type tending to prove the parent's unfitness to have care, custody and control of his child. **On this basis alone, the court's judgment terminating [the father's] rights is sustainable.** [Citations.]" *(In re Angelia P., supra,* 28 Cal.3d 908, 925, emphasis added.)

Without, of course, suggesting appellant's conduct was comparable to that of Angelia P.'s father, that case is instructive on two of the determinative elements here — the fact that the victim of the crime which the trial court found proved appellant's unfitness was the minor herself and the effect of the crime on the minor.

These elements distinguish this case from such cases as *In re Terry E., supra,* in which this court reversed a trial court's termination of the parental rights of a mother convicted of various sex crimes committed with the victim's husband. Although the children were in the house when the criminal acts were committed, they did not witness any of the acts. 5/ Here, Stacy was removed without warning from her usual environment, taken thousands of miles away, and required to change her name and her appearance — all with serious traumatic consequences.

Any suggestion that appellant should retain his parental rights on the chance that in several years he might prove his reliability — as he did, falsely, before the second kidnapping — is asking that Stacy take all the risks. This is particularly unacceptable when there is a need for a stable family life and there is a stepfather prepared to provide the necessary ingredient for such a life.

This brings us to another essential difference in this case and most of the cases in which the courts have refused to free children from the custody and control of a felon-parent — the presence here of another natural parent and a qualified stepparent. In *In re Terry E.* and the cases cited therein the minors were referred to county welfare adoption agencies or other appropriate agencies, and in most instances had been in foster homes for varying lengths of time. The interest of a court in retaining the bonds of blood in such cases is understandable. Here, allowing appellant to retain any rights could only constitute a threat to Stacy and hinder the establishment of a solid, permanent, protective family environment.

We conclude that the trial court here "could objectively find a reasonable probability that the conditions, i.e., the criminal disposition of the parent which gave rise to the felony conviction would continue in the future to render the parent unfit to care for the child." *In re Terry E., supra,* 180 Cal.App.3d 932, 952.)

5/ They heard moans and other noises and "apparently saw [the victim] at one point when she was bound and naked to the waist." (*In re Terry E., supra,* 180 Cal.App.3d 932, 940.)

Appellant has attempted — at the trial level by implication, and here directly — to characterize this case as one in which "a parent's rights were terminated on the sole ground that [that] parent had taken and concealed the child from the other parent." 6/ The trial court rejected this narrow view; so do we. The trial court exercised its discretion in a proper manner and the termination of appellant's parental rights was based on clear and convincing evidence.

II. SECTION 232, SUBDIVISION (a)(4) DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST FELONS

Appellant contends that section 232, subdivision (a)(4) unconstitutionally discriminates against felons because there is no compelling need to treat felons differently from other miscreant parents. Appellant claims that a parent who is a felon is a member of a discrete and identifiable class subject to review under the equal protection clause of the California and United States Constitutions. And, the argument continues, such parents possess fundamental rights in the custody, care, and nurture of their children citing *Stanley v. Illinois* (1972) 405 U.S. 645, 651-652, and *In re B.G.* (1974) 11 Cal.3d 679, 688-689. Appellant further relies on the constitutional standards set forth in *Serrano v. Priest* (1971) 5 Cal.3d 584, 597:

> "'[I]n cases involving "suspect classifications" or touching on "fundamental interest," [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a **compelling** interest which justifies the law but that the distinctions drawn by the state are **necessary** to further its purpose.' [Citations.]"

Appellant acknowledges the legitimate state interests in protecting the welfare of the child as recognized in California law. (See *In re David B.* (1979) 91 Cal.App.3d 1984, 192-193.) However, he argues that his classification as a felon rather than a

---

6/ A collateral argument advanced by appellant is that the kidnappings were prompted by his love for Stacy. This is, at least legally if not actually, the equivalent of a rapist talking about "love" for his victim — the emotion, even if it exists, does not justify the act.

misdeamanant 7/ creates an irritational classification when applied to section 232, subdivision (a)(4) and since this classification was used to infringe on his fundamental right of parenting it is violative of the equal protection and due process clauses of the United States and California Consititutions.

The equal protection clause directs that "all persons similarly circumstanced shall be treated alike." (*F.S. Royster Guano Co. v. Virginia* (1920) 253 U.S. 412, 415.) However, the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v. Texas* (1940) 310 U.S. 141, 147.)

"A classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (*Reed v. Reed* (1971) 404 U.S. 71, 76.)

The conventional standard of review applicable to an equal protection issue requires that differential treatment of classes of individuals must rest on a reasonable basis and may not be arbitrary. The classification is deemed reasonable if it is based on some natural, intrinsic or constitutional distinction and is germane to a legitimate purpose within the power of the Legislature. (*Schwalbe v. Jones* (1976) 16 Cal.3d 514, 517-518; *Bilyeu v. State Employees' Retirement System* (1962) 58 Cal.2d 618, 623.) Where a classification is drawn along lines which render it "suspect" in constitutional terms 8/ or which touches upon a "fundamental interest," strict scrutiny is required and the state bears a burden of establishing that it has a "compelling interest" which justified the law and that the classification is necessary to further that purpose or interest. (*In re Terry D.* (1978) 83 Cal. App.3d 890, 895.)

The courts have held that the goal of section 232 is to promote the welfare of the child; and that the state has not only a "compelling interest" but also a "duty" to sever parental bonds once a situation contemplated by the statute arises. (*In re Terry D., supra,* 83

7/ Both offenses of which appellant was convicted could have been sentenced as misdemeanors, and he argues his convictions on Penal Code 278 and 278.5 created no more harm to society or to Stacy than the harm protected by Penal Code section 273a, subdivision (2) (willful cruelty or unjustifiable punishment of child; endangering life or health) or Penal Code section 647a (annoying or molesting a child under age of 18) — both misdemeanors.

8/ Appellant concedes the felon-parent classification at issue is not "suspect."

Cal.App.3d 890,896; *In re Eugene W.* (1972) 29 Cal.App.3d 623, 629.) In *In re Eugene W.*, a classification made under section 232, subdivision (a)(5) (relating to mentally ill parents) was held valid against a constitutional challenge, and the court applied the conventional or reasonable basis standard rather than the strict scrutiny or compelling state interest standard. (*Id.* at pp. 627-628.) The court in *In re Terry D., supra,* followed this approach and used the reasonable basis standard in reviewing the classifications made under section 232, subdivisions (a)(2) (relating to abusive or neglectful parents) and (a)(7) (relating to children who have been in foster homes for two or more years.) A statutory classification which permits the severance of parental ties when the parent has been convicted of a felony as opposed to a misdemeanor is fully justified. 9/

The determination by a district attorney to prosecute a violation of Penal Code section 278 or 278.5 as a felony rather than a misdemeanor is discretionary, not arbitrary. The determination depends on the facts surrounding the crime. It is the Legislature's responsibility to classifiy crimes and prescribe more severe punishment for the commission of one class of crime as opposed to another class of crime as a deterrent against the commission of the more serious crime. (*People v. Smith* (1933) 218 Cal. 484, 489.) The fact that appellant was sentenced to state prison indicates that the trial court determined that prison time, a felony sentence, was appropriate to appellant's crime. 10/

III. SECTION 232, SUBDIVISION (a)(4) IS NOT UNCONSTITUTIONALLY VAGUE

Section 232 provides in pertinent part:

"(a) An action may be brought for the purpose of having any child under the age 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:

". . . . . .

9/ The Legislature also restricted the **felonies** which may provide a basis for severance of parental ties to those in which "the facts of the crime . . . are of a nature so as to prove the unfitness of the parent. . . to have the future custody and control of the child." (See part III, **post**.)

10/ Furthermore, the purpose of section 232, subdivision (a)(4) is to protect the child, not punish the felon-parent. (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759.)

"(4) Whose parent or parents are convicted of a felony, if the facts of the crime of which the parent or parents were convicted are of a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child."

Appellant contends this section is unconstitutionally vague because it fails to warn appellant of the nature of the prohibited conduct and to provide for the application of the laws with specificity.

The due process clauses of the California and federal Constitutions require civil as well as criminal statutes to be sufficiently clear to provide a standard for uniform application. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231.) However, reasonable certainty is all that is required. A statute will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by a reference to other definable sources. (*American Civil Liberties Union v. Board of Education* (1963) 59 Cal.2d 203, 218.) Courts have a duty not to be ingenious to find ambiguities in statutes because of extraneous matters, but to interpret them in such a manner that they may be free from abiguity and to give, if possible, a construction which not only renders them constitutional, but which is consistent with sound sense and wise policy with a view to promoting justice. (*Estate of Todd* (1941) 17 Cal.2d 270; *Adoption of Thevenin* (1961) 189 Cal.App.2d 245.) Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.)

When section 232, subdivision (a)(4) is read with Penal Code section 278, the statute which defines one of the felonies in question, and when both are considered in light of the facts in the instant case, the nature of the prohibited conduct is clearly defined and the statute is not void for vagueness. The pertinent portion of Penal Code section 278 reads as follows:

"Every person, not having a right of custody, who maliciously takes, detains, conceals, or entices away, any minor child with intent to detain or conceal that child from a person, guardian, or public agency having the lawful charge of the child shall be punished by imprisonment in the state prison. . .".

The elements of the crime as outlined in Penal Code section 278 make abundantly clear those facts from which the trial court concluded that appellant is an unfit father under section 232, subdivision (a)(4). At his criminal trial appellant was determined beyond a reasonable doubt to have maliciously taken, detained, concealed or enticed away Stacy. Evidence was presented below to establish that Stacy's name and appearance were changed in order to avoid detection, and the events which occurred during the taking and concealing caused her severe emotional trauma.

IV. APPELLANT WAS NOT ENTITLED TO HAVE A JURY DETERMINE THE FACTUAL ISSUE OF HIS FITNESS TO RETAIN PARENTAL RIGHTS

Appellant contends that, "as a matter of public policy, the fundamental nature of the substantive right to parent should be supported by a procedural right to a jury trial of factual issues because other persons facing equivalent consequences or even less drastic sanctions enjoy the right to a jury trial."

This argument is meritless. A proceeding to determine the termination of parental rights is a special proceeding created by statute. Because it did not exist at common law and there is no statute providing for a jury trial, appellant was not entitled to one. (*In re David E.* (1978) 85 Cal.App.3d 632, 635.)

V. APPELLANT RECEIVED SUFFICIENT NOTICE OF THE CHARGES AND WAS NOT DENIED A FAIR TRIAL BY DENIAL OF HIS MOTION FOR APPOINTMENT OF AN INDEPENDENT MENTAL HEALTH PROFESSIONAL TO EXAMINE STACY.

Appellant contends, in part, he has been denied a fair trial because the petition failed to include sufficient details to enable to him to meet the charges adequately.

Courts have held in child dependency cases under Welfare and Institutions Code section 300 that it is "fundamental to due process" to provide notice to parents of the specific facts and allegations upon which deprivation of custody is predicated. (*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) Such notice is necessary to enable the parents to properly meet the charges against them. (*Ibid.*) In juvenile court proceedings, where the "parents'

right to. . .custody [is] at stake," due process demands that the youth and his parents be given notice "of the specific issues that they must meet." (*In re Gault* (1967) 387 U.S. 1, 33-34; *In re Jay R.* (1983) 150 Cal.App.3d 251, 259.) A fortiori such notice is required in section 232 proceedings (*In re Christina P.* (1985) 175 Cal.App.3d 115, 131, fn. 7) and a bare recital of the conclusionary words of the statute does not suffice as notice. (*In re Jeremy C., supra,* 109 Cal.App.3d 384, 397.)

However, this case is distinguished from *In re Jeremy C.* in that here there was more than mere conclusionary words of the statute. The petition alleged:

> "The subject minor should be freed from the custody and control of the natural father on the basis of the follow: . . .[¶] On or about February 15, 1984 [sic] the natural father. . .was convicted of three [sic] felony counts of kidnapping of the child and sentenced to prison for a term prescribed by law; by reason thereof, John R. [P], Jr., is unfit to have custody of the minor child." 11/

The felony committed by appellant directly involved his child, and the allegation of the kidnapping imparted sufficient knowledge and notice to allow appellant to defend against the charges.

Next, appellant contends he was denied a fair trial when the lower court denied his motion for an appointment of a psychiatrist to evaluate Stacy.

Appellant aruges that by denying his motion for an independent, unbiased phsychological evaluation of Stacy, the trial court, in effect, determined that Dr. Hedberg was the only expert necessary which, according to appellant, "left [appellant] in the same position he would have been in if the court had ordered a psychological examination of Stacy under Evidence Code §730." Appellant concludes "[t] he net effect of the court's order [denying the requested evaluation] was to allow Hedberg to decide this case." 12/

11/ Appellant does not raise the point that the number of felony convictions was incorrectly stated in the petition.

12/ Appellant suggests, "[p]erhaps if the petition had alleged that Stacy had suffered some particular form of emotional distress as a result of the taking, then the court would have allowed [appellant] access to Stacy's emotional state through a pyschiatric evaluation."

Of course, Dr. Hedberg was **not** court appointed. He was a witness called by Debra's attorney and was fully cross-examined by appellant's counsel. Appellant had ample time and opportunity to examine Dr. Hedberg and the court allowed appellant to submit questions to Dr. Hedberg regarding whether Stacy sustained any trauma as a result of the actions of appellant and whether future counseling would enable Stacy and appellant to reunite. The weight and credibility to be given to Dr. Hedberg's testimony was one for the trier of fact.

Appointment of an expert under Evidence Code section 730 is discretionary with the court. (*McGuire v. Superior Court* (1969) 274 Cal.App.2d 583, 598.) The court did not abuse its discretion in denying appellant's motion, particularly in light of its order permitting appellant to submit to Dr. Hedberg a list of pertinent subject matter questions and to video tape or tape record a session between Dr. Hedberg and Stacy.

The judgment is affirmed. Respondent is awarded her costs on appeal.

/s/ IVEY

IVEY J.*

WE CONCUR:

/s/ HAMLIN

HAMLIN Acting P.J.

/s/ BEST

BEST J.

* Assigned by the Chairman of the Judicial Council.

APPENDIX C

Supreme Court
FILED
January 20, 1988
Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, No. F007984
S003399

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE STACY LYNN P., A MINOR

DEBRA L. B., Respondent

v.

JOHN R. P., Appellant

Appellant's petition for review DENIED

LUCAS

Chief Justice

APPENDIX D

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Court of Appeal
Fifth Appellate District
FILED
February 18, 1988
Kevin A. Swanson, Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the matter of STACY LYNN P., a minor,	NO. F007984
DEBRA L. B., Petitioner and Respondent vs. JOHN R. P., JR., Objector and Appellant	NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that JOHN R. P., JR., the Objector in the state trial court and Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the California Supreme Court, dated January 20, 1988, denying review of the opinion of the Court of Appeal of the State of California in and for the Fifth Appellate District.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated: February 17, 1988.

/s/
DOUGLAS B. CONE
Attorney for appellant

APPENDIX E

Texts of Constitutional and Statutory Provisions

CALIFORNIA CIVIL CODE

§232. Persons entitled to be declared free from parental custody and control

(a) Description of person. An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:

(1) Person abandoned by parents to care and custody of another; intent; support or communication with child. The child has been left without provision for the child's identification by his or her parent or parents or by others or has been left by both of his or her parents or his or her sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child. The failure to provide identification, failure to provide support, or failure to communicate shall be presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In those cases in which the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(2) Person neglected or cruelly treated by parents. Who has been neglected or cruelly treated by either or both parents, if the child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for one year prior to the filing of a petition pursuant to this section. Physical custody by the parent or parents for insubstantial periods of time shall not serve to interrupt the running of the one-year period.

(3) Person whose parents under disability due to use of alchol or controlled substances or morally depraved. Whose parent or parents suffer a disability because of the habitual use of alcohol,

or any of the controlled substances specified in Schedules I to V, inclusive, of Division 10 (commencing with Section 11000) of the Health and Safety Code, except when these controlled substances are used as part of a medically prescribed plan, or are morally depraved, if the child has been a dependent child of the juvenile court, and the parent or parents have been deprived of the child's custody continuously for one year immediately prior to the filing of a petition pursuant to this section. As used in this subdivision, "disability" means any physical or mental incapacity which renders the parent or parents unable to adequately care for and control the child. Physical custody by the parent or parents for insubstanial periods of time shall not interrupt the running of the one year period.

(4) Person whose parents convicted of felony. Whose parent or parents are convicted of a felony, if the facts of the crime of which the parent or parents were convicted are of a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child.

(5) Person whose parents are declared to be developmentally disabled or mentally ill. Whose parent or parents have been declared by a court of competent jurisdiction, wherever situated, to be developmentally disabled or mentally ill, if, in the state or country in which the parent or parents reside or are hospitalized, the Director of Mental Health or the Director of Developmental Services, or their equivalent, if any, and the superintendent of the hospital of which, if any, the parent or parents are inmates or patients, certify that the parent or parents so declared to be developmentally disabled or mentally ill will not be capable of supporting or controlling the child in a proper manner.

(6) Person whose parent or parents are mentally disabled. Whose parent or parents are mentally disabled and are likely to remain so in the foreseeable future. As used in this subdivision, "mentally disabled" means that a parent or parents suffer any mental incapacity or disorder which renders the parent or parents unable to adequately care for and control the child. The evidence of any two experts, each of whom shall be either a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or under Section 6750 of the Welfare and Institutions Code, or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, shall be required to support a finding under this subdivision. If, however, the parent or parents reside in another state or in a foreign

country, the evidence required by this subdivision may be supplied by the affidavits of two experts, each of whom shall be either a physican and surgeon who is a resident of that state or foreign country, and who has been certified by a medical organization or society of that state or foreign country to practice psychiatric or neurological medicine, or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders and who is licensed in that state or authorized to practice in that country. If the rights of any parent are sought to be terminated pursuant to this subdivision, and the parent has no attorney, the court shall appoint an attorney for the parent pursuant to Section 237.5, whether or not a request for the appointment is made by the parent.

(7) Person in supervised out-of-home placement for one year period. Who has been in out-of-home placement under the supervision of the juvenile court, the county welfare department, or other public or private licensed child-placing agency for a one year period, if the court finds that return of the child to the child's parent or parents would be detrimental to the child and that the parent or parents have failed during that period, and are likely to fail in the future, to maintain an adequate parental relationship with the child, which includes providing both a home and care and control for the child.

If the minor has been adjudged a dependent child of the juvenile court and placed in out-of-home placement pursuant to Section 361 of the Welfare and Institutions Code, the one-year period shall be calculated from the date of the dispositional hearing at which the child was placed in out-of-home placement pursuant to that section. If the minor is in placement under the supervision of a county welfare department or other public or private licensed child-placing agency, pursuant to a voluntary placement, as described in Section 16507.4 of the Welfare and Institutions Code, the one-year period shall be calculated from the date the minor entered out-of-home placement.

The court shall make a determination that reasonable services have been provided or offered to the parents which were designed to aid the parents to overcome the problems which led to the deprivation or continued loss of custody and that despite the

availability of these services, return of the child to the parents would be detrimental to the child. The probation officer or social worker currently assigned to the case of the child shall appear at the termination proceedings.

If the minor has been adjudged to be a dependent child of the court pursuant to Section 300 of the Welfare and Institutions Code, the court shall review and consider the contents of the juvenile court file in determining if the services offered were reasonable under the circumstances.

Trial placement of the child in the physical custody of the parent or visitation of the child with the parent during the one-year period, when the trial placement or visitation does not result in permanent placement of the child with the parent, shall not serve to interrupt the running of the one-year period.

(8) Minor found to be dependent child and reunification services not to be provided. A minor who has been found to be a dependent child of the juvenile court and the juvenile court has determined, pursuant to paragraph (3), (4), or (5) of subdivision (b) of Section 361.5 of the Welfare and Institutions Code, that reunification services shall not be provided to the minor's parent or guardian.

(b) . . .

(c) Clear and convincing evidence. A finding pursuant to this section shall be supported by clear and convincing evidence.

CALIFORNIA PENAL CODE

§273a. Willful cruelty or unjustifiable punishment of child; endangering life or health

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, **4,** or **6** years.

(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

CALIFORNIA PENAL CODE

§278. Unlawful detention, concealment, etc.; punishment

Every person not having a right of custody, who maliciously takes, detains, conceals, or entices away, any minor child with intent to detain or conceal that child from a person, guardian or public agency having the lawful charge of the child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars ($10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

CALIFORNIA PENAL CODE

§278.5 Violation of custody or visitation decrees; punishment

(a) Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

(b) Every person who has a right to physical custody or visitation with a child pursuant to an order, judgment, or decree of any court which grants another person, guardian, or public agency right to physical custody of or visitation with that child, and who within or without the state detains, conceals, takes or entices away that child with the intent to deprive the other person of that right to custody or visitation shall be punished by imprisonment in the state

prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

CALIFORNIA PENAL CODE

§647a. Vagrancy; annoying or molesting child under 18; punishment

Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year.

(647a. Renumbered §647.6 and amended by Stats. 1987, c. 1418, §4.3)

TITLE 28 U.S.C.

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision against its validity.

(2) By appeal, where is drawn the question of validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

ATTORNEY APPEARANCE FORM

No. _____

In re STACY LYNN P., *a minor,*

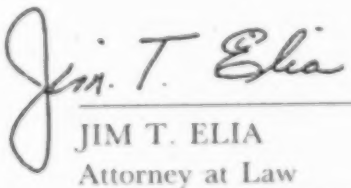
JOHN R. P., JR., *Appellant*

vs.

DEBRA L. B., *Appellee,*

The Clerk will enter my appearance as counsel for JOHN R. P., JR., who in this Court is the Appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States.



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APPENDIX G

CERTIFICATE OF SERVICE

I, JIM T. ELIA, one of the attorneys for appellant, JOHN R. P., JR., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of April, 1988, I served copies of the foregoing JURISDICTIONAL STATEMENT on the several parties hereto, as follows:

1. The Attorney General of the State of California by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to Attorney General of the State of California, 350 McAllister Street, San Francisco, California 94102.

2. On DEBRA L. B. by depositing a copy of the document in a United States mail box, with First Class Postage prepaid, addressed to her counsel of record, DIANNE R. OPHELIA, 800 M Street, Fresno, California 93721.

3. On STACY LYNN P., a minor, by depositing a copy of the document in a Unites States mail box, with First Class Postage prepaid, addressed to her counsel of record, Robert Ishikawa, Attorney at Law, 1433 Kern Street, Fresno, California 93706.

As a result of the foregoing, all parties required to be served have been served.

Jim T. Elia

JIM T. ELIA
Counsel for Appellant

Supreme Court, U.S.
FILED
MAY 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1734

In The
Supreme Court of the United States
October Term, 1988

In re STACY LYNN P., a minor

JOHN R. P., JR.,
Appellant,

vs.

DEBRA L. B.,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

MOTION TO DISMISS

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No. 87-1734

In The

Supreme Court of the United States

October Term, 1988

In re STACY LYNN P., a minor

JOHN R. P., JR.,

Appellant,

vs.

DEBRA L. B.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

MOTION TO DISMISS

STATEMENT OF FACTS

The young Appellee and Appellant were married, and the only child of their marriage, STACY LYNN, was born on December 10, 1976. The parties remained together until March of 1978, when they separated. The Appellant took STACY violently and without Appellee's permission within a month following the Appellee's filing for Dissolution in Arizona. The Appellee retrieved STACY through a Writ of Habeas Corpus and, after the event with

Appellant, filed a petition for Dissolution in Nevada. Subsequent to these events, Appellee moved back to her mother's home in Fresno, California.

Sometime after having assumed residence in California, Appellee filed her petition for Dissolution in California, and sought an Order to Show Cause regarding custody and visitation in response to Appellant's erratic visitation demands after his arrival in Fresno, subsequent to some three (3) months of erratic telephone calls. (RT 106:22-25, RT 20/18-21-23, 21/4-25).

After visitation was established by the court, the Appellant utilized his first weekend-long visitation as an occasion to kidnap.

Ten (10) months later and after the use of a private investigator by the Appellee, Appellant and STACY were located in Colorado, where Appellant was living under one of several aliases. STACY was returned to her mother.

After STACY's life had resumed normalcy, the Appellant was granted slowly-increasing visitation, beginning initially with short visits in STACY's psychologist's office and expanding to day-long, unsupervised visitation by the fall of 1982.

During one of his day-long, unsupervised visits with STACY, soon after the visitation right was granted, Appellant again kidnapped her. Appellant and STACY were again found, this time submerged in Florida, living under new names and under new appearances. Appellant had kidnapped his child for a period of five (5) months upon this occasion.

Appellant returned to California and submitted to arrest. In late 1983, he was tried and sentenced to serve three (3) years in State Prison for violation of Penal Code Sections 278 and 278.5.

While Appellant was in prison, Appellee filed a petition to free STACY from Appellant's custody and control under Civil Code Section 232, to enable her second husband to adopt STACY.

Upon his release from prison, Appellant filed a Motion for an Order for psychiatric evaluation of STACY. This Motion was denied.

After a lengthy trial of the petition to free STACY from Appellant's custody and control, the trial court found that Appellant was displaying unfitness as a parent when he attempted to permanently deprive STACY of contact with her mother and when he "kept the pot boiling" as far as STACY's ability to freely settle down and know that she would no longer be subject to traumatic upheavals in her life. (Appellant's Appendix A-5).

During the trials and subsequent appeals, Appellee has contended that Civil Code Section 232 is certainly specific enough to enable Appellant to determine what the facts of the crime are in relation to the Petition to terminate his parental rights. She has contended that there is no unconstitutional discrimination against felons, and that any difference in the treatment of felons as opposed to persons who have committed misdemeanors is justified because of the manner in which the two degrees of crime are segregated and because of the state's interest in providing for welfare of its children. The Appellee has

argued that her petition to terminate the Appellant's parental rights sufficiently informed the Appellant of the charges that he would have to meet to enable him to adequately defend his position.

ARGUMENT

VIOLATION OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Appellant proposed two arguments relating to the violation of his right to due process: The entire State of California failed to subject Civil Code Section 232 to strict scrutiny, and that the classification of individuals under Civil Code Section 232 bears no rational relation to a legitimate state purpose. These two concepts are so inextricably intertwined that Petition addresses both simultaneously.

There is no argument that parents possess fundamental rights in the custody, care, and nurture of their children. (*Stanley v. Illinois* (1972) 405 U.S. 645, 651-652, 92 S.Ct. 1208, 31 L.Ed.2d 551).

The State of California has held,

> In cases involving "suspect classifications" or touching upon "fundamental interests" (Footnotes omitted), the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (Citations omitted). Under the strict standard applied to such cases, the State bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions

drawn by the law are necessary to further its purposes. *Serrano v. Priest* (1971) 5 Cal.3d 584, 597.

The State has a compelling interest in the welfare of its children as expressed in many cases, among them *Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777 and *Prince v. Commonwealth of Massachusetts* (1944) 321 U.S. 804, 64 S.Ct. 438, 442.

In California, a Statute may read in conjunction with other, definable sources in order to give the first practical effect. *People v. Superior Court of Alameda County* (1977) 19 Cal.3d 338, 345.

The Supreme Court must utilize the interpretation of state law as promulgated by the Supreme Court of that State. *Wainwright v. Stone* (1973) 414 U.S. 21, 22-23, 94 S.Ct. 190, 192, 338, 345. The Supreme Court in California let stand the opinion of Fifth (5th) Appellate District, in which the trial court's termination of Appellant's parental rights was upheld.

California Civil Code Section 232(a)(4) indicates that a parent may be considered an unfit parent and subject to termination of custody and control of his child if that parent has committed a felony and if the facts of the crime of which that parent was convicted are of a nature so as to prove the unfitness of the parent to have future custody and control of the child. When read with the Statutes

under which the Appellant was convicted, Penal Code Sections 278, and 278.5, the Civil Code Section becomes clear.

Penal Code Sections 278 and 278.5 may be found in Appellant's Appendix E pp. 5-6. Civil Code Section 232 may be found in Appellant's Appendix E pp. 1-4.

Moreover, the Civil Code Section 232.5 provides standards under which Civil Code Section 232 are to be construed:

> The provisions of this Chapter shall be liberally construed to serve and protect the interests and welfare of the child. In all proceedings to declare a child free from parental custody and control, the court shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interests of the child.

The purpose of the Civil Code chapter of which Section 232 is a part is found in Civil Code Section 232.6:

> The purpose of this chapter is to serve the welfare and best interests of the child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life.

Crimes are classified according to severity and punished accordingly. Both the State of California and the United States divide crimes into felonies and misdemeanors. California Penal Code Section 17(a) reads as follows:

> A felony is a crime which is punishable with death or by imprisonment in a State Prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

18 United States Code Section 1(1) reads as follows: "Any offense punishable by death or imprisonment for a term exceeding one (1) year is a felony."

Great discretion is vested in the legislatures of the individual states and classification of individuals by these legislatures will be upheld if the classification rests on grounds even partially relevant to achievement of the states' objective. (*McGowan v. Maryland* (1961) 366 U.S. 420, 425. 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.)

The Legislature of California will be presumed to have mandated a more severe punishment for violations of Penal Code Sections 278 and 278.5 then for such crimes as those described in Penal Code Sections 273(a) or 247(a) (Appellant's Appendix, pp. E-4 and E-6) for a constitutionally-sound reason.

The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Tigner v. Texas* (1940) 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124.

The imposition of a felony conviction upon the Appellant is an expression of the nature of the crime as outlined by Penal Code Sections 278 and 278.5, and a further expression of the seriousness of the crime of which Appellant was convicted. Appellant has indicated that the conviction could have been either one imposing a misdemeanor or a felony sentence. When this alternative is provided in the Code section, however, the trier of fact is to apply the more appropriate of alternative sentences. (*People v. Smith* (1968) 259 Cal.App.2d 868, 873.)

The court has noted, in *People v. Irwin* (1984) 155 Cal.App.3d 891, 899, heightened culpability involved with

Penal Code Section 278, and the court noted ". . . malice, the element required for violation of Section 278 . . . is a term of art which imports a higher level of culpability . . .".

Appellant was not charged arbitrarily. He was charged with violation of the law which was applicable to his behavior. Penal Code Sections 273(a) and 647(a), both misdemeanors, to which Appellant compares Penal Code Sections 278 and 278.5, do not describe the behavior in which Appellant participated. Appellant did not physically injure his child in any manner. Appellant committed a crime against the other parent. *People v. Campos* (1982) 131 Cal.App.3d 894, 899.

Appellant was charged under the Penal Code Section which applied to the action which he took. Appellant's sentence, which classified his conviction as that of a felony, was applied to Appellant because that was the most appropriate sentence for the actions that he undertook.

The State of California, however, is not simply predicating termination of parental rights on conviction of a felony or a misdemeanor. Civil Code Section 232 contains the modifying phrase ". . . if the facts of the crime of which the parent or parents were convicted however the nature as to prove the unfitness of the parent or parents to have the future custody and control of the child."

The trial court sat through days of testimony in order to determine that this modifying phrase was satisfied. During this trial, the Appellant had extensive opportunity to present evidence in support of his position.

Appellee also calls the attention to the fact that it is not the State of California which is acting to terminate

Appellant's parental rights. It is, in fact, the other parent who is taking this action. The fact that it is one private individual against another private individual underlines the need for "fundamental fairness." (*Santosky v. Kramer* (1982) 455 U.S. 748, 102 S.Ct. 1388, 71 L.Ed.2d 599). The concerns about the state's unfair advantage and the protections that must be afforded the private citizen, as expressed in *Matthews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 are muted to the extent that in this case, each party has equal access to the court, equal access to money, or lack thereof, and equal access to time.

Since the parties are equal, then the concern of the court should be fundamental fairness, and since there was an extensive hearing, the need for fundamental fairness has been satisfied and Appellant's rights to Due Process have not been violated.

Had the Code Section not contained the mitigating phrase regarding an indication of unfitness to continue care and custody of the child, then the Code Section might be unconstitutional. In that event, there would be no relationship between the Code Section and the end which it was attempting to achieve, as is required by the strict scrutiny standard as expressed in *Serrano v. Priest* (1971) 5 Cal.3d 584, 597. As it is written, however, the Code Section narrows the application of a parental termination proceeding to apply only when the felony of which the parent was charged indicates that some harm may come to the child. This is a direct correlation with the state's concern for the welfare of its children.

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VAGUENESS OF PETITION

Appellant charges that the Petition filed by the Appellee was too vague to enable him to adequately defend against it.

Appellant made no demurrer to the Petition when it was filed initially, indicating that Appellant did not find the Petition vague initially.

Procedural Due Process requires that notice which is appropriate to the nature of the case. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.)

The Court has also noted that, "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (*Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230.)

A generally higher standard of notice will be required to comport with a fundamental interest such as parenting. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758, 102 S.Ct. 1388, 1397, 71 L.Ed.2d 599.)

California has complied with this standard of notice for the Appellant.

California Code of Civil Procedure Section 469 notes that to be fatal, a variance in pleading must have misled or served to mislead the adverse party. The Petition for termination of the Appellant's parental rights alleged the felony of kidnapping as the basis upon which the action was brought. There is nothing misleading in this allegation.

Appellant states that this was inadequate notice to enable him to sufficiently defend his position.

The Court has noted that legal documents can be read in conjunction with the activities with which they are concerned. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110-111, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222.)

In *Grayned,* the Court was considering a statute that prohibited disturbances near a school, and noted that the Court could look at the prohibited activities and measure them against their affect on the normal activities of a school.

This Petition presents a very similar situation. True, the Petition simply states that it is based on the Appellant's kidnapping of the little girl; however, Appellant had taken such actions upon three (3) occasions and had been convicted for the third kidnapping. He has committed no other felonies. Again, when read in conjunction with the charging statute, Civil Code Section 232, it provides sufficient notice for Appellant that he will be obligated to defend against the aspects of a kidnapping or of this kidnaping that render him unfit to continue with the care and custody of the little girl. Had there been a number of felonies, or had the effect of the felonies varied each time, or had there been some other aspect about the felony that rendered it confusing as far as the Petition went, this allegation would be germane. This, however, is not the case.

The Appellant cites *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 as standing for specificity in Petitions. However, in *Gault* the parents of the child were

given no notice at all of the charge, or any factual basis for the judicial action, which it initiated. Additionally, no testimony was elicited from the complainant. And again, *Gault* concerned an action by the State against an individual. In *Gault*, the Petition specified only that "said minor is a delinquent minor." *In re Gault* (Supra) 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527. The Court expressed concern that the alleged misconduct was not outlined sufficiently for the accused to defend. After all, delinquency could be defined in many different ways.

In this case, kidnapping is quite specific. The aspects of kidnapping that could render the parent unfit to act as the caretaker of the child in the future, are not so varied that it is impossible for the Appellant to determine how to proceed with his case.

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CONCLUSION

Civil Code Section 232 is not vague, initially because the clause under which the Appellant lost custody and control of his child is modified by a phrase which provides a specific relationship between the felony and the goal that the State is accomplishing through this statute, that of protecting its minor children.

Any classification of individuals under this law is a result of classification under the relevant Penal Code Sections, and has been done based on the seriousness of the crime and the crime's relationship to the child. The law is specific and is directed toward protection of children.

The application of the law is not vague. The Appellant's parental rights were not terminated in a vacuum. There was no arbitrary and ad hoc in determination that the Appellant should lose his parental rights. On the contrary, the Trial Court heard days of testimony, including that of the psychologist of whom Stacy had been a patient since after the second kidnapping. If protection of children is to mean anything, the laws surrounding the children must be formulated in such a fashion that they can be applied to the myriad of situations in which human beings will find themselves. Civil Code Section 232 is to be considered by the Court in the light of Section 232.5 and 232.6, both of which interpret how 232 is to be construed and its purpose.

Appellant's due process rights under the 14th Amendment to the United States Constitution have been protected by the public hearing of the issue, which provided him every opportunity to explore the parameters of Section 232 and to defend against the allegations contained within the Petition.

The allegations within the Petition are specific enough also to provide ample protection for the Appellant's due process rights. Appellant was convicted of one felony, and, unless the Petition seriously misled the Appellant as to the nature of the allegation, he will be considered to have had adequate notice of the charges against which he had to defend. There was no misleading in this Petition, it was very straightforward. The Appellant realized that he had to defend against the aspects of kidnapping that would render him unfit to maintain custody and control of this child. The Appellant obviously knew that he had

not harmed his child, so he could easily recognize the remaining facets that would be inherent in the affect of a kidnapping on a child.

In short, the Appellant has had a fair opportunity to defend against the loss of his parental rights and if he has lost these rights, it is a result of his own actions and not a result of any failure of the legal system to deal with him in any way that has obscured his legal rights.

Respectfully submitted,

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APPENDIX A

Texts of Statutory Provisions

CALIFORNIA CODE OF CIVIL PROCEDURE

Section 469. No variance between the allegation in a pleading and the proof is deemed to be material, unless it actually misled the adverse party to his prejudice in maintaing his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended upon such terms as may be just.